

The ALJ found claimant did not give timely notice for the alleged accident of June 12, 1998. But the ALJ concluded claimant did have a series of microtraumas causing permanent injury through September 28, 1998 (not the last day worked). For the series,

the ALJ concluded claimant had given notice within 10 days. On that basis the ALJ ordered respondent to pay for medical treatment and temporary total disability benefits.

The jurisdictional issues on appeal are as follows:

1. Did claimant give timely notice of a June 12, 1998 accident?
2. Did claimant meet with personal injury by accident arising out of and in the course of employment through a series of microtraumas culminating in disability on September 28, 1998 or when he left work on October 9, 1998? If so,
3. Did claimant give notice for the series of accidents within 10 days as required by K.S.A. 44-520? If notice was not given within 10 days, was there just cause for the delay? If there was just cause for the delay, did respondent have notice within 75 days?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order for Compensation should be affirmed.

For an appeal from a preliminary hearing order, the Board's jurisdiction is limited. The Board may review only allegations that the ALJ exceeded his/her jurisdiction. K.S.A. 1998 Supp. 44-551. This review includes authority to review the "jurisdictional" issues identified in K.S.A. 1998 Supp. 44-534a.

The Board concludes the order respondent appeals in this case did not exceed the ALJ's jurisdiction. First, despite claimant's preliminary hearing testimony that his condition stayed about the same, the Board agrees that taken as a whole the evidence supports the allegation that claimant experienced a series of injuries through the last day worked. This conclusion is supported by claimant's description of the work he did and the histories he gave to Dr. Thomas E. Botz and Dr. Michael L. Smith that the condition gradually worsened. The fact that claimant was able to continue working for a time until he had to leave work due to his pain also supports this conclusion. The August 5, 1998 report by Dr. Botz states that the "onset was attributed to no one specific incident but generally to performing the requirements of his job i.e. lots of bending and lifting." Later, claimant attributed the onset to a specific lifting incident but reported to Dr. Botz that his symptoms were "getting worse." Dr. Smith's October 16, 1998 notes likewise report a worsening of symptoms:

He reports that approximately five months ago while at work he was lifting a trash can when he had discomfort in his lower back. This occurred right

away. It persisted. He sought some chiropractic help. Approximately two months later he began to notice increasing discomfort into the left leg. . . . It is aggravated with bending, prolonged sitting, coughing, walking, lying flat and sneezing. He feels that his leg pain is worsening while his back pain is staying about the same.

On November 16, 1998, claimant underwent surgery for the removal of a large disc herniation at L5-S1. The Board concludes the evidence establishes by a preponderance of the credible evidence that claimant met with personal injury by a series of microtraumas through the last date worked, October 9, 1998.

Second, the Board concludes claimant gave timely notice of the series of accidents. Respondent only acknowledges receiving notice of the June 12, 1998, accident on October 3, 1998. Claimant testified that after he sought chiropractic treatment on the Tuesday, Wednesday and Thursday following the June 12 accident, he was given a back brace which he wore to work and that he advised his employer why he was missing work and that the condition was work related. Claimant's wife said she also discussed the injury with claimant's employer. The ALJ rejected this testimony but concluded the notice claimant gave respondent on October 3, 1998 should, in context with the circumstances, be notice sufficient to satisfy the statutory requirements. The Board agrees. The notice was given before what may be treated as the date of accident, the last day worked. But in a case involving a series, the date of accident is in actuality a fiction used to fix the date benefits begin and assign responsibility. The fiction serves a function but should not be confused with the reality that the injury occurs over a period of time. Notice during the period the injury is occurring satisfies the notice requirements.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order for Compensation entered by Administrative Law Judge Bryce D. Benedict on January 26, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Daniel L. Doyle, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director